No. 73-1742

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC., RESPONDENT

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS

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INTEREST OF AMICUS CURIAE

The State of Texas, through the Texas Air Control Board, is responsible for implementing the federal Clean Air Act in Texas. The Board, pursuant to the provisions of the Texas Clean Air Act, utilizes a variance procedure similar to the Georgia variance procedure disallowed by the Fifth Circuit in the instant case. Under this procedure the Board has issued a number of variances allowing extensions of compliance deadlines for various lengths of time up to May 31, 1975. The Board has received notice under the Clean Air Act citizen suit provision that the validity of these variances will be challenged on the basis of the Fifth Circuit's decision.[1] Therefore, the State of Texas is critically concerned with the Court's resolution of this case.

ARGUMENT AND AUTHORITIES

(a) *Introduction*

The Clean Air Act, 42 U.S.C. § 1857c-5(a), provides that the states shall submit implementation plans to the Environmental Protection Agency which provide for the maintenance, implementation and enforcement of the national primary ambient air quality standards "as expeditiously as practicable". Pursuant to EPA's implementation plan regulations, the Texas Air Control Board submitted a plan that called for a compliance date of December 31,

[1] A copy of this notice is provided as Appendix I.

1973. The plan clearly indicated that the compliance date was selected with the understanding that a small number of sources would be unable to achieve compliance by that date. These sources, it was understood, would utilize the variance procedures contained in the Texas Clean Air Act, which was submitted and approved as a part of the state's implementation plan.

It is important, in evaluating the arguments presented by the *amicus* and the Fifth Circuit's decision, to understand the actual operation of the variance procedure in Texas. To begin with, the Texas Clean Air Act authorizes variances in strictly limited situations.[2] Only if the denial of a variance would result in (a) the arbitrary and unreasonable taking of property or (b) the practical closing of a lawful business can a variance be granted. These limited statutory provisions account for the extremely small number of variances currently outstanding in the State of Texas. Of approximately 3,000 air pollution sources in Texas, only thirteen have been issued variances. Further, these variances, based upon an administrative record after ex-

[2]Section 3.21 of the Texas Clean Air Act, TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1974), provides:

> The board may grant individual variances beyond the limitations prescribed in this Act or in the rules and regulations of the board whenever it is found, upon presentation of adequate proof, that compliance with any provision of this Act, or any rule or regulation of the board, will result in an arbitrary and unreasonable taking of property, or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people . . . .

haustive public hearings, generally impose stringent interim compliance schedules.

Texas therefore believes that the position taken by the First, Second, and Eighth Circuit Courts of Appeals[3] and by EPA, allowing the granting of state variances in the period before the attainment date for national ambient air standards, achieves the goals of Congress and does so "as expeditiously as practicable".

(b) *The Fifth Circuit's construction of § 1857c-5(f) as the exclusive means of granting variances under the Clean Air Act deprives the states of flexibility necessary to implement their plans and is contrary to Congressional intent.*

In construing the pertinent provisions of the Clean Air Act involved in this case, it is important that the meaning and intent of the whole statute be considered. As this Court stated in *Richards v. United States*:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." 369 U.S. 1, 11 (1962)

[3] *Natural Resources Defense Council v. Environmental Protection Agency*, 494 F.2d 519 (2nd Cir. 1974); *Natural Resources Defense Council v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973).

As shown below, the Fifth Circuit's mechanistic construction of § 1857c-5(f) vesting the Administrator of EPA with the exclusive authority to grant extensions of compliance deadlines, does violence to the goals and overall operation of the Clean Air Act.

First, the Act places the duty of controlling air pollution at its source not on the Administrator, but squarely on the states. 42 U.S.C. § 1857(a)(3) specifically states that "the prevention and control of air pollution at its source is the primary responsibility of the states and local governments"; the federal role, given a sound and well administered implementation plan, is essentially one of oversight. Consistent with this policy of state primacy, the Act requires the states, not the Administrator, to prepare and implement a plan to achieve the national ambient air quality standards established by EPA. Section 1857c-5(a)(2)(A) allows the state considerable flexibility in the attainment of these standards. The state is allowed to pick any date, up to three years after the plan's approval—i.e., before May 31, 1975 — which will achieve compliance with national primary standards "as expeditiously as practicable." As noted earlier, Texas chose December 31, 1973, as the compliance date for the regulations contained in its implementation plan, concluding that all but a handful of the 3,000 sources in the state could comply by that date and that the noncompliant few would be placed on abatement schedules via the state variance procedure and submitted to EPA as revisions or modifications of the plan.

If the procedure mandated by 42 U.S.C. § 1857c-5(f) were the only means of issuing variances from the state selected compliance dates in state implementation plans, not only would the Act's policy of state primacy in air pollution regulation be violated, but the Congressional goal of achieving the national ambient air standards as expeditiously as practicable would be frustrated. A state, unable to impose compliance schedules through a variance procedure on *certain* individual sources, might well postpone the compliance deadline for *all* sources. Congress surely cannot have intended such an anomalous result, yet this is precisely the result fostered by the decision of the Fifth Circuit. The First Circuit, by contrast, recognized the problem and concluded quite correctly that the Act

> ". . . permitt[ed] a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply."
>
> 478 F.2d at 887.

(c) *Section 1857c-5(a)(3) authorizes the Administrator of EPA to allow state variance programs.*

Section 1857c-5(a)(3) provides that the Administrator of the Environmental Protection Agency "shall approve any *revision* of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the state after reasonable notice and public hearings." (Em-

phasis added.) The provisions in paragraph (2) are those same general requirements laid out for the state implementation plan.

The plain language of this section would seem to authorize the Administrator to approve state-issued variances as revisions to the implementation plan as long as they otherwise complied with the Act. Such variances, imposing compliance schedules different from that generally required in the implementation plan as originally submitted to and approved by EPA, would obviously constitute "changes" or "modifications" of the plan, terms which are commonly equated with the word "revision".[4]

The Fifth Circuit arbitrarily rejected this common sense approach and, without citation of authority, blandly concluded that "[a] revision is a change in a generally applicable requirement . . . [while a] variance [is] a change in the application of a requirement to a particular party." 489 F.2d at 401. While this distinction may be "familiar and clear" to the Fifth Circuit, your *amicus* finds it remarkably novel. Not only does it fail of any linguistic or semantical sense, it does not particularly serve the purposes of the Act.

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[4]See definitions of "revise" and "revision" in WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1969) at p. 1944, and in THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969) at p. 1112.

This Court has held that in the absence of persuasive reasons to the contrary, the words of a statute will be given their ordinary meaning. *Bank v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465, (1968) *Commissioner v. Brown*, 380 U.S. 563 (1965) (departure from ordinary meaning justified only to avoid absurd results).

Consider the following hypothetical: A state has concluded that one of only two sources of a given pollutant in a given air quality control region in the state cannot meet the general compliance deadline set forth in the implementation plan approved by EPA, but that the other source can. The state has also concluded, however, that within six months the non-compliant source can install the necessary abatement equipment to meet the regulation and that the combined contribution of the two sources in the meantime will not result in a violation of the EPA-set ambient air standard for that pollutant in that region. The state, it would seem, short of completely shutting the plant down, with the accompanying economic hardship and dislocation, has two alternatives: (a) it can issue a variance to the non-compliant source requiring that it install the necessary equipment and be in compliance in six months; or (b) it can redraw the regulation itself in such a fashion that the non-compliant source can comply. This could be done, for example, by dropping the sampling technique which causes the source to read in violation of the regulation, leaving in effect only those sampling procedures which do not yield violations.[5] Alternatives (a) and (b) would each effective-

[5]A convenient example is the "opacity" sampling procedure for measuring the emission of particulates. Under this procedure a trained observer "reads" the plume coming from a source to see to what percentage degree it obscures visibility. The test is designed to control easily respirable and hence more dangerous small particles of matter. Many industries contend that, while they cannot comply with opacity measurements, they can meet the other two common tests of particulate emission—in stack concentration and property line concentration. These methods, however, rely on the weight of the particles and thus do not effectively meet the small particle problem.

ly exempt the non-compliant source, but only (a) would violate the Fifth Circuit's rationale and hence require rejection by the Administrator. Alternative (b) would seemingly pass Fifth Circuit muster, since it is a "change in a generally applicable requirement." 489 F.2d at 401. As long as alternative (b) otherwise complied with § 1857c-5(a)(3), it would be approvable thereunder.

In short, the Fifth Circuit's "distinction" between *revision* and *variance* is, in the true sense of the phrase, a distinction without a difference.[*] What really matters is not so much the form in which the state deals with the problems that arise in the practical administration of its implementation plan, but rather whether the method chosen will achieve compliance "as expeditiously as practicable" as required by the Act.

CONCLUSION

The decision of the Fifth Circuit is without foundation in law or logic. Not only does it contravene the Clean Air Act's policy of state primacy in the regulation of air pollution at its source, discourage the states from setting early dates for compliance with their implementation plans, and subvert the ordinary meaning of the words Congress chose in writing the Act, the decision also is in direct conflict with

[*] This is, of course, not quite accurate. There is a substantial, deleterious difference between alternatives (a) and (b) in the hypothetical discussed in the text. While alternative (a), the variance given to the one non-compliant source, ensures that the compliant source maintains the low level of emissions required by the general regulation, alternative (b), the regulation amendment method, permits the compliant source to increase emission levels.

the interpretation placed on the Act by the agency entrusted with its enforcement. As this Court noted in *Udall v. Tallman*, 380 U.S. 1 (1965), an agency's interpretation of the statute it administers is entitled to great weight and should be respected by the courts if reasonable. As Texas has shown, allowing the states to deal with isolated instances of non-compliant sources through a variance procedure, with EPA exercising its rightful role as arbiter of whether any given variance/revision meets the requirements of the Act, is an eminently workable and reasonable construction of the Act.

The decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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[1]It should be noted that the Administrator's approval of any "revision" of a state implementation plan can be subjected to judicial review under 42 U.S.C. § 1857h-5(b)(1).

PROOF OF SERVICE

I, Philip K. Maxwell, one of the attorneys for the State of Texas, *amicus* herein, and a member of the Bar of the United States Supreme Court, hereby certify that, on the 22nd day of November, 1974, I served copies of the foregoing brief to the Supreme Court of the United States and on the several parties thereto as follows:

1. On Russell E. Train, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert H. Bork, Solicitor General, Wallace H. Johnson, Assistant Attorney General, Edmund W. Kitch, Assistant to the Solicitor General, Edmund B. Clark, and Henry J. Bourguinon, Attorneys, Department of Justice, Washington, D.C. 20530.

2. On the Natural Resources Defense Council, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Richard E. Ayres, Natural Resources Defense Council, Inc., 1710 N Street, N.W., Washington, D.C. 20036.

PHILIP K. MAXWELL
Assistant Attorney General

APPENDIX I

LAW OFFICES OF
J. Raymond Needham
OLD COTTON EXCHANGE
802 TRAVIS STREET
Houston, Texas 77002
TELEPHONE (713) 236-0 81

March 19, 1974

Certified Mail No. 286264
Return Receipt Requested

RECEIVED
MAR 20 1974
LEGAL
AIR POLLUTION CONTROL

Mr. Charles R. Barden
Executive Secretary
Texas Air Control Board
8520 Shoal Creek
Austin, Texas 78758

Re: Subsection 304(b) of The Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. Section 1851, et seq)

Dear Mr. Barden:

Pursuant to the provision of Subsection 304(b) of The Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. Section 1351, et seq), Sharon E. Gorman and other persons, citizens of the United States and the State of Texas, hereby serve the attached Notice as a prerequisite to commencement of a civil action under the above statute.

Very truly yours,

J. Raymond Needham

JRN:ce

Enclosure

cc: Mr. Terrence L. O'Rourke
Assistant Attorney General of Texas
One Main Plaza, Suite 325
Houston, Texas 77002

NOTICE

That

SHARON E. GORMAN
#4 BAY VILLA
BAYTOWN, TEXAS 77520

and other persons,

citizens of the United States of America and State of Texas, pursuant to subsection 304(b) of the Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. §§ 1857 et seq) and 40 C.F.R. 54; 36 F.R. 23386, December 9, 1971, hereby give notice as a prerequisite to the commencement of a civil action to enforce the law and will show in the appropriate United States Courts as follows:

I.

That, the Administrator of the Environmental Protection Agency approved the State of Texas's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970. And that said plan allows Texas officials to grant variances from particular requirements of the plan. And that the plan directs Texas officials to take into account economic impact and technological feasibility in the discharge of their duties under the Texas Clean Air Act, (Article 4477-5, sec. 3.13 VACS).

II.

That, the Texas Air Control Board has granted variances from the particular requirements of the Texas Clean Air Act and rules, regulations and orders of said Board. That said variances are contrary to the requirements of the implementation plan prescribed by the Federal Clean Air Act.

III.

That certain corporations doing business in the State of Texas [the names of which are attached hereto as appendix A] from and

after January 1, 1974, and each and every day thereafter have emitted and continue to emit air contaminants into the atmosphere so as to violate the emission standards and limitations required by the Texas Clean Air Act and Rules and Regulations adopted by the Texas Air Control Board, under variances issued by the Texas Air Control Board. And that said emissions into the atmosphere are unlawful.

IV.

That under the case of the Natural Resources Defence Council v. Environmental Protection Agency, Civil No. 72-2402, (5th Cir., Feb. 8, 1974), the conduct of the Administrator, Texas Air Control Board, and above mentioned corporations is clearly illegal.

Respectfully,

J. [illegible]
Old Cotton Exchange Building
207 [illegible]
Houston, Texas 77002

Attorney for Sharon E. Gorman